

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Remanded by Supreme Court February 26, 2007

LARRY DOTSON v. STATE OF TENNESSEE, RICKY BELL, WARDEN

Appeal from the Criminal Court of Davidson County
No. 3619 Steve Dozier, Judge

No. M2007-00412-CCA-RM-HC - Filed May 3, 2007

This case is before us after remand by the Tennessee Supreme Court for reconsideration in light of its opinion in *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007). The Davidson County Criminal Court summarily dismissed the petitioner, Larry Dotson's, pro se petition for writ of habeas corpus. Upon review, we affirm the criminal court's order dismissing the petition.

Tenn. R. App. P. 3 Appeal; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

Larry Dotson, Nashville, Tennessee Pro Se.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION ON REMAND

BACKGROUND

According to the petitioner's judgments of conviction dated December 11, 2001, the petitioner entered guilty pleas to one count of aggravated assault and two counts of attempted first degree murder. He was sentenced to three years for his aggravated assault conviction and twenty years for each of his attempted first degree murder convictions. His sentences were ordered to run concurrently, resulting in a total effective sentence of twenty years.

Subsequently, the petitioner filed a pro se petition for writ of habeas corpus, alleging he was released on bail from the offense of aggravated assault when he committed the two offenses of

attempted first degree murder. The petitioner argued his concurrent sentences were illegal and void because they were imposed in contravention of Tennessee Code Annotated section 40-20-111(b) and Tennessee Rule of Criminal Procedure 32(c)(3)(C), which mandates consecutive sentences under such circumstances. In support of his allegation, the petitioner submitted copies of the following documents: his prisoner offender sheet, judgments of conviction, arrest warrant for aggravated assault, and bail receipt. These documents were included in the record on appeal. The transcript of the petitioner's plea hearing was not included in the record.

In a written order, the Davidson County Criminal Court summarily dismissed the petition, stating:

[T]his Court is unable to make the determination that the [petitioner] was out on some sort of release from the Aggravated Assault charge when the new offenses occurred because the Court does not have the documentation necessary to make this determination. The petitioner submitted a document indicating that he had made bond on an *assault* charge but there is no proof that this charge is the same aggravated assault which the petitioner was subsequently convicted of. Therefore, the petitioner's petition is respectfully denied.

The petitioner appealed.

ANALYSIS

The determination of whether to grant relief upon review of a petition for habeas corpus is a question of law. *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000). Accordingly, review is de novo with no presumption of correctness given to the findings of the lower court. *Hogan v. Mills*, 168 S.W.3d 753, 755 (Tenn. 2005).

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated sections 29-21-101 through 29-21-130 codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. *See Taylor*, 995 S.W.2d at 83. The burden is on the petitioner to establish, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). Moreover, it is permissible for a court to summarily dismiss a petition for habeas corpus

relief, without the appointment of counsel and without an evidentiary hearing, if the petitioner does not state a cognizable claim. *See Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

In his petition and on appeal, the petitioner alleges that his sentences are illegal because he was on bail from his aggravated assault conviction during the time he committed the two offenses of attempted first degree murder. A review of the submitted judgments of conviction indicate that the petitioner committed the offense of aggravated assault on August 3, 1999. Approximately, a year-and-a-half later, on December 30, 2000, the petitioner committed the offenses of attempted first degree murder. Subsequently, the petitioner pled guilty to all three convictions and received concurrent sentences on December 12, 2001. The bail receipt reflects that the petitioner posted bail for an “assault” on August 11, 1999, which the petitioner alleges to be the bail for the aggravated assault offense. According to the petitioner, the fact that the bail receipt reads “assault,” rather than “aggravated assault” is a notational error made by the bail bondsman. The petitioner submits that it can be inferred from the documents that he was on bail for aggravated assault at the time he committed the offenses of attempted first degree murder.

Tennessee Code Annotated section 40-20-111(b) states in relevant part:

In any case in which a defendant commits a felony while such defendant was released on bail in accordance with the provisions of chapter 11, part 1 of this title, and the defendant is convicted of both such offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that such sentences be served cumulatively.

Also, Tennessee Rule of Criminal Procedure 32(c)(3)(C) provides:

Where a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply: . . . to a sentence for a felony where the defendant was released on bail and the defendant is convicted of both offenses

A sentence imposed in direct contravention of a statute is void and illegal. *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000). Accordingly, if the petitioner’s allegation is proven, the sentences imposed by the trial court are void and illegal.

In the instant case, the criminal court summarily dismissed the petitioner’s claim after essentially finding no clear proof of an illegal sentence. Based upon our supreme court’s recent decision in *Summers v. State*, we conclude that the criminal court’s summary dismissal was appropriate.

In *Summers*, our supreme court held:

For the reasons stated herein, we overrule *McLaney* to the extent that it can be interpreted to require the appointment of counsel and a hearing whenever a pro se habeas corpus petition alleges that an agreed sentence is illegal based on facts not apparent from the face of the judgment.

Summers, 212 S.W.3d at 254. With regard to the procedural requirements necessary for seeking habeas corpus relief, our supreme court explained:

McLaney has been read to dictate that whenever a pro se petitioner fails to attach to his habeas corpus petition pertinent documents from the record of the underlying proceedings, he must be afforded the opportunity, with the assistance of counsel, to cure any deficiency in his filings.¹ This reading of *McLaney* is inconsistent with applicable statutes and prior decisions permitting summary dismissal, without the appointment of counsel, *unless the alleged illegality is apparent from the pro se petition and the documents attached thereto*.

Id. at 259 (emphasis added). Thereafter, our supreme court stated the following:

A trial court is vested with the discretion to determine whether appointment of counsel is necessary The petitioner bears the burden of providing an adequate record for summary review of the habeas corpus petition, including consideration of whether counsel should be appointed. *In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions. When such documents from the record of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing.* Any broader interpretation of when the appointment of counsel is necessary would be inconsistent with the narrow scope of habeas corpus relief and the strict technical requirements for seeking such relief.

Id. at 261 (emphasis added). Therefore, in accordance with *Summers*, we conclude that the criminal court's summary dismissal was proper because no illegality of sentence is evident on the face of the judgments and the petitioner "failed to support his factual assertions with pertinent documents from the record of the underlying proceeding." *Id.* at 262.

¹ See, e.g., *Dotson v. State*, No. M2005-00436-CCA-R3-HC, 2006 WL 264269, at *3 (Tenn. Crim. App. Jan. 31, 2006); *Pritchard v. State*, No. M2005-00594-CCA-R3-HC, 2005 WL 3487842, at *4 (Tenn.Crim.App. Dec. 16, 2005); *Eidson v. State*, No. M2005-00150-CCA-R3-HC, 2005 WL 1353310, at *4 (Tenn. Crim. App. June 8, 2005); *Goods v. Parker, Warden*, No. W2003-02914-CCA-R3-HC, 2004 WL 2309901, at *3 (Tenn. Crim. App. Oct. 13, 2004) (footnote in original).

CONCLUSION

In accordance with the aforementioned authorities, we affirm the criminal court's judgment dismissing the habeas corpus petition.

J.C. McLIN, JUDGE